

Santaliz v OR FM Assoc.
2021 NY Slip Op 33600(U)
September 28, 2021
Civil Court of the City of New York, Kings County
Docket Number: Index No. HP 259/2021
Judge: Julie Poley
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART B

-----X
NOLAN SANTALIZ,

Index Number HP 259/2021

Petitioner,

-against-

DECISION/ORDER

OR FM ASSOCIATES and
TZIFIL REALTY CORP

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT,

Respondents.

-----X

Present:

JULIE POLEY
Judge, Housing Court

Recitation, as required by CPLR 2219(a):

Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	0
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4
Stipulations.....	5
Other.....	0

This is an HP proceeding in which Petitioner Nolan Santaliz is the tenant of apartment 2C in the building located at 922 East 15 Street, Apt. 2C, Brooklyn, New York 11230, Brooklyn, New York 11237 (“premises”), and Respondents OR FM Associates and Tzifil Realty Corp (collectively referred to as “Respondents”), are the owners of the premises within the meaning of the Housing Maintenance Code (“HMC”). Petitioner commenced this proceeding on or about March 31, 2021 seeking civil penalties and an order to correct based on HMC violations at the premises, as well as a finding of harassment. Respondents filed an Answer on or about May 4, 2021.

For repairs, Petitioner alleged the following conditions in the petition: (1) constant leak in kitchen; (2) non self-closing front door; (3) kitchen window sliding down; and (4) living-room window with draft. (*See*, R. Ex. A). The petition further alleged:

“The landlord has repeatedly neglected to properly repair the kitchen window. He’s conducted the same type of repair each time presuming the issue is caulking. Each time caulking is done, I continuously had a leak. He lied in court under oath that no contactor arrived to appropriately assess the issue with our window when a representative from Atlantic Window Repairs (hired by Philip Orner himself) was present and deemed the issue with the window is capping and would cost about \$600.00. The representative specially stated the constant leaks worn the capping out and it needs to be properly resealed. The dates of all leaks are as follows: 04/16/2018, 08/12/2018, 09/28/2018, 11/24/2018, 11/26/2018, 01/25/2020, 07/11/2020, 11/30/2020, 01/16/2021, and 3/24/2021.” (*See*, R. Ex. A).

Before the court is Respondents’ motion to dismiss pursuant to CPLR § 3211.¹

Respondents contend that this proceeding should be dismissed in its entirety as the conditions complained of no longer exist. Respondents’ motion is supported by an affirmation which alleges that Petitioner acknowledged certain repairs were complete and that all remaining repairs were complete on June 2, 2021. The affirmation also alleges that there is video evidence which shows the self-closing door is in good working order, that the premises were exterminated, and that the complained of conditions are not present or do not constitute violations. (*See*, Affirm. of F. Orner, dated June 16, 2021). Respondents attach exhibits in support which include email exchanges with their adversary, invoices for extermination services, and invoices for window repairs. (*See*, R. Ex. D). Also attached are certificates of correction for four (4) violations at the subject building, however, the certificates of correction are not for violations at the premises. (*See*, Ex. D).²

¹ Respondents do not cite a specific CPLR § 3211 subsection for their motion, which was served after their responsive pleading was served.

² Violation # 14098558 [exterminating Apt. C4], Violation # 14187929 [remove encumbrances at roof bulkhead, 4th story], Violation # 14187932 [remove encumbrances at public hall, 4th story], Violation # 14187943 [remove encumbrances at public hall, 3rd story]. (*See*, R. Ex. D).

Petitioner opposes and argues that the proceeding cannot be dismissed because there are open violations of record at the premises. Petitioner attached an open violation report for the building as of July 27, 2021. (*See*, P. Ex. 1). Petitioner also alleges that there is no basis to dismiss the harassment claim. In reply, Respondents argue that the affirmation from Petitioner's counsel has no probative value because Petitioner's counsel does not have personal knowledge of the alleged conditions in the premises, and Respondents again contend the conditions are corrected. On August 30, 2021, this Court heard oral argument and reserved decision. All Court appearances took place via Microsoft Teams and all parties are represented by counsel at this time.

A motion to dismiss pursuant to CPLR § 3211(a)(1) may be granted “only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law.” (*Cavaliere v. 1515 Broadway Fee Owner, LLC*, 150 A.D.3d 1190, 1191 [2nd Dep't 2017]; *citing, Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

As a preliminary matter, the Court takes judicial notice of HPD's violation records as *prima facie* evidence of proof of the conditions stated therein. (MDL § 328(3); *see also, Dept. of Hous. Preserv. & Dev. of the City of N.Y. v. Knoll*, 120 Misc.2d 813 [App Term, 2nd Dep't 1983] [HPD's computer database records are *prima facie* evidence of any matter stated therein.]). The attached HPD violation report shows ten (10) open violations at the subject premises. (*See*, Exhibit 1 attached hereto). In addition, after a notice of violation is served it is an owner's responsibility to certify that the violation has been corrected, and “failure to file such certificate of compliance shall establish a *prima facie* case that such violation has not been corrected.” (HMC § 27-2115(f)(7)). Furthermore, “the court may retain continuing jurisdiction of any action

or proceeding relating to a building until all violations of law have been removed.” (See, N.Y. City Civ. Ct. Act § 110(c)).

To overcome the presumption contained in the HMC, Respondents will need “documentary evidence in the form of a certification of compliance or repair receipts or detailed testimony of repairs being done so as to show when and what repairs were specifically corrected ...” (*Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2nd and 11th Jud. Dists. 1992], citing *Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Knoll*, 120 Misc.2d 813 [App Term, 2nd Dep’t 1983]). The balancing act between the statutory presumption and ensuing burden is justified “since the knowledge of the work, labor and services performed is within the purview of the owner, it is reasonable to place on him, the burden of properly establishing, through his testimony and proof, that the violations listed have been properly corrected.” (*Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2nd and 11th Jud. Dists. 1992]).

As discussed, the ten (10) open HPD violations at the premises are *prima facie* proof of the conditions. (See, MDL § 328(3)). Although Respondents are correct that an attorney affirmation alone without personal knowledge is “without evidentiary value and thus unavailing,” that does not change the fact that the HPD violations remain open and are still *prima facie* proof of the conditions. (See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Furthermore, when comparing the open HPD violations to the conditions alleged in the petition, there is significant overlap. For example, the petition contains several complaints concerning the kitchen window, and currently, there are still five (5) open violations concerning the kitchen window: (Violation # 14449832 [water leak], Violation # 14449834 [paint and

plaster], Violation # 14187969 [counter balance at upper and lower sash], Violation # 13932969 [water leak], and Violation # 13920375 [water leak]. There are also open violations for the self-closing doors, which Petitioner complained of (Violation # 13729661), and for windows other than the kitchen window (Violation # 14187968 [window counter balance at upper and lower sash in the 3rd room from East], Violation # 13729658 [defective spring balance at lower sash window at south wall in the 4th room from East]). Additional open violations are for the bathroom ceramic wall tile (Violation # 14187970) and for a key operated lock installed at the door to the room with the fire escape (Violation # 13729670). Petitioner seeks an order to correct based upon the open violations, however, Respondents allege that repairs are complete, which constitutes an affirmative defense. (*See, Dept. of Hous. Preserv. & Dev. v. 163 Ocean Tenants Corp.*, 2000 N.Y. App. Div. LEXIS 14226 [2nd Dep't 2000]).

The evidence that Respondents submit to prove that the conditions are corrected is not sufficient to warrant dismissal of this proceeding. (*See, Cavaliere v. 1515 Broadway Fee Owner, LLC*, 150 A.D.3d 1190, 1191 [2nd Dep't 2017]; *citing, Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Documentary evidence in the form of certificates of correction is lacking. Respondents have not attached certificates of correction for any of the aforementioned ten (10) open HPD violations at the premises. (*See, HMC § 27-2115(f)(7)*). As noted, the certificates of correction that Respondents did attach to the motion were not for conditions at the premises. (*See, R. Ex. D*). Respondents' Answer did include certificates of correction for closed violations in Petitioner's kitchen (Violation # 14101520 [water leak at East wall in kitchen], and Violation # 14101526 [paint and plaster]), however, those certificates of correction are from April of 2021 and HPD issued subsequent violations in July of 2021 for similar conditions in the premises (Violation # 14449832 [water leak], Violation # 14449834 [paint and plaster]).

Therefore, the probative value of the old certificates of correction are mitigated by the subsequent HPD violations which remain open.

Respondents also fail to submit sufficiently detailed repair receipts or detailed testimony to overcome the presumption contained in the HMC concerning open HPD violations at the premises. Although Respondents attach receipts concerning extermination services, extermination is not an issue presented in this proceeding. Respondents also reference “videotape evidence” of the self-closing doors being corrected, however, Respondents fail to elaborate further to establish when and what repairs were done to correct the open HPD violation.

Respondents’ attorney, who is also the managing agent, provides receipts concerning certain window repairs, but those receipts are not sufficient to utterly refute the conditions complained of. There are open HPD violations for windows in several different rooms in the premises and the purported receipts are not sufficiently detailed. For example, one invoice that Respondents attach, dated May 18, 2021, does not specify which window is being repaired, such as the kitchen window or living room window, and the apartment number is hand-written on the otherwise typed invoice. (*See*, R. Ex. D). Another invoice, dated May 25, 2021, also fails to specify which window balance is being repaired. The invoice also has “tops only” handwritten on it, however, an open HPD violation for the kitchen window concerns an upper and lower sash (Violation # 14187969 [counter balance at upper and lower sash]), and open HPD violations for windows other than the kitchen window include upper and lower portions of the windows (Violation # 14187968 [window counter balance at upper and lower sash in the 3rd room from East], Violation # 13729658 [defective spring balance at lower sash window at south wall in the 4th room from East]). (*See*, R. Ex. D). As such, Respondents have failed to submit proof in the

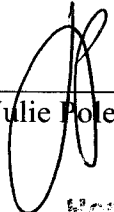
form of documentary evidence to show specifically what window repairs were corrected. (*See, Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2nd and 11th Jud. Dists. 1992], citing *Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Knoll*, 120 Misc.2d 813 [App Term, 2nd Dep't 1983]). Furthermore, HPD issued violations for the kitchen window in July 2021, which is *after* the alleged repairs were complete (emphasis added).

As there are issues of fact concerning the repairs and open HPD violations, a hearing is required to resolve the factual dispute. (*Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1073 [2nd Dep't 2008] [hearing must be conducted if a factual dispute exists which cannot be resolved on the papers alone.]). Testimony and cross-examination elicited at trial will afford the Court the opportunity to make determinations concerning these factual disputes, and the trial Court will have the opportunity to weigh the credibility of testimony provided. Therefore, based on the foregoing affirmative defenses, these issues cannot be resolved on papers alone and are ripe to be heard at a trial.

Therefore, for the reasons stated, Respondents' motion to dismiss is denied and this proceeding is transferred to Part X for trial.

This constitutes the Decision/Order of this Court, which shall be uploaded to NYSCEF.

Dated: September 28, 2021
Brooklyn, New York


Julie Foley JHC
Honorable Julie Foley